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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

ALAN D. WEINBERGER and
THE ASCII GROUP, INCORPORATED,

Petitioners,

v.

STEFAN F. TUCKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the rule in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) – that, except where state law is incompatible with federal interests, the *res judicata* or claim preclusive effect of a civil judgment of a federal district court having diversity jurisdiction under 28 U.S.C. § 1332 is to be determined as a matter of federal law by the claim preclusion rules of the state in which the federal district court sits – applies as well to determine the collateral estoppel or issue preclusive effect of a federal district court's diversity case judgment?

2. If so, whether under *Semtek* and the federalism principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938), the federal district court in a diversity case must apply all of its host state's issue preclusion rules (as determined by the highest court of the host state) or may apply only that portion of state issue preclusion rules with which the federal district court agrees as a matter of discretion as allowed by the federal common law of issue preclusion?

3. Whether, as a matter of federal law, a collateral order of a federal district court denying in a diversity case a motion to disqualify a law firm (on which there is a high burden of proof) may be given issue preclusive effect in a subsequent civil action brought against an attorney in that firm and alleging that attorney's malpractice, fraud, and breach of fiduciary duty (on which there is a lesser burden of proof)?

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OPINIONS BELOW

The opinion of the United States court of Appeals for the Fourth Circuit is reported at 510 F.3d 486 (4th Cir. 2007) and is attached hereto as Appendix A at 1a-18a. The decision of the United States District Court for the Eastern District of Virginia (E.D. Va. Nov. 9, 2006) is unreported, but appears in the Appendix hereto at Appendix B at 19a-21a and Appendix C at 22a-23a.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit, affirming the district court's judgment, was handed down on December 20, 2007. A timely petition for rehearing and rehearing *en banc* was denied on January 15, 2008. Appendix G at 31a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS INVOLVED

The Rule of Decision Act, 28 U.S.C. § 1652 is attached hereto as Appendix H at 32a.

STATEMENT

This case raises an important question about the federalism principle first articulated in *Erie* and later extended in *Semtek* to the application of collateral estoppel or issue preclusion on judgments of the federal district courts in diversity cases.

On July 1, 2004, Alan Weinberger ("Weinberger") and The ASCII Group, Inc. ("ASCII") (together, "Petitioners") commenced an action pursuant 28 U.S.C. § 1332 in the United States District Court for the District of Columbia against Stefan Tucker, an attorney licensed to practice law, and practicing law, in the District of Columbia (hereinafter "*ASCII II*"). On September 28, 2005, the district court transferred the action to the United States District Court for the Eastern District of Virginia, on the grounds that an earlier action in that district court, *Volftsun v. The ASCII Group, Inc., et al.*, Case No. 02–1717A ("*ASCII I*"), gave the Eastern District of Virginia greater familiarity with the transactions and occurrences at issue in *ASCII II*. The Complaint in *ASCII II* included allegations of wrongdoing by Tucker in the course of the bench trial in *ASCII I*.

Once transferred, the district court granted Tucker's motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss all Counts in the Complaint.. In affirming the district court's judgment, the United States Court of Appeals for the Fourth Circuit concluded that collateral estoppel or issue preclusion principles precluded all claims for damages against Tucker alleged in *ASCII II*, including claims for malpractice, breach of fiduciary duty, and fraud pursuant to the laws of the District of Columbia. The Fourth Circuit reasoned that the claims raised in *ASCII II* were actually or necessarily decided in *ASCII I*, a diversity action to which Tucker was not a party, and which was decided as a matter of the Delaware laws of contract interpretation and enforcement.

As a centerpiece of its decision, the Fourth Circuit concluded that a collateral order in *ASCII I* that denied a motion to disqualify Tucker's law firm from representing Plaintiff Volftsun in *ASCII I* represented a "full and fair opportunity" for Petitioners to litigate their claims against Tucker for malpractice, breach of fiduciary duty, and fraud in *ASCII II*. According to the Fourth Circuit, the collateral order in *ASCII I* conclusively determined that, as of January 2001, Petitioners were no longer clients of Tucker and, therefore, that Petitioners were are barred as a matter of law from enforcing their claims against Tucker in *ASCII II* for Tucker's acts on behalf of Petitioners *after* January 2001, including Tucker's alleged wrongdoing during the course of the bench trial in *ASCII I*. As a subordinate conclusion for its decision, the Fourth Circuit decided that, although Tucker was not a party in *ASCII I*, Tucker was "in privity" with his client Volftsun in *ASCII I* because Tucker shared his client Volftsun's interest in the enforcement of the contract at issue between ASCII and Volftsun in *ASCII I*.

REASONS FOR GRANTING THE PETITION

A. Conflict among the Circuits.

The decision of the Fourth Circuit against Petitioners is in conflict with decisions of the following Circuits, each of which have recognized that *Semtek* principles govern the issue preclusive effect of earlier diversity case judgments of the federal district courts: *The Ananta Group, Ltd. v. Jones Apparel Group, Inc.*, 230 Fed. Appx. 39, 40 2007 U.S. App. LEXIS 10070 **3 (2d Cir. May 1, 2007); *Houbigant, Inc. v. Federal*

Insurance Co., 374 F.3d 192, 204 (3d Cir. 2004); *Extra Equipmentos E Export Exportacao LTDA v. Case Corp.* 361 F.3d 359, 363 (7th Cir. 2004). The decision of the Fourth Circuit is somewhat in line, however, with the decision of the Tenth Circuit in *Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1209 (10th Cir. 2001), in which the United States Court of Appeals for the Tenth Circuit applied both federal and state issue preclusion rules to a diversity case judgment of a federal district court upon concluding that the issue preclusive effect is the same under either set of rules.

In reaching its decision, the Fourth Circuit did not cite or apply *Semtek*. Instead, the Fourth Circuit recited both federal and Virginia law on issue preclusion, but adopted and applied merely some, but not all, of Virginia's rules of issue preclusion. The Fourth Circuit grounded its recitation of Virginia law in the fact that *ASCII II* – not *ASCII I* — "is a diversity jurisdiction case in a Virginia federal district court," 510 F.3d at 491, Appendix A at 7a, ignoring the transfer of the action from the United States District Court for the District of Columbia.

B. The Decision Below Incorrectly Applies *Semtek* by Failing to Adopt and Apply all of Virginia's Issue Preclusion Rules.

Under *Semtek*, the issue preclusion rules of Virginia, and only such rules, determines the issue preclusive effect, if any, of *ASCII I* in *ASCII II*. "The Supreme Court has held that the preclusive effect of any decision by a federal court, sitting in a diversity action, is to be determined by the applicable preclusion law of the state

in which the district court sat." *Semtek*, 531 U.S. at 508–09.. *Semtek* requires that this Court apply the *entirety* of the Virginia rules of issue preclusion.

Yet the Fourth Circuit failed to discuss, much less to apply, an essential element of the Virginia rules of issue preclusion: identity of issues between *ASCII I* and *ASCII II*. For Virginia preclusion to apply, the "issue decided in the former action must have been identical with the issue presented in the second action." *Storm v. Nationwide Mutual Ins. Co.*, 199 Va. 130, 134 (Va. 1957); *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 167, 171 (Va. 2003) (holding that, for purposes of *res judicata*, preclusion only applies if the cause of action a plaintiff asserts in a pending proceeding is the same as the cause of action asserted in the former proceeding," and otherwise rejecting a broader "transactional test" for purposes of preclusion); *Graham v. VEPCO*, 230 Va. 273, 277 (Va. 1985) ("An appropriate test for determining the identity of issues involved in former and subsequent actions is "'whether the same evidence will support both actions.'") (using the terms "res judicata" and "collateral estoppel" interchangeably) (citations omitted).

The elements of the claims in *ASCII I* and *ASCII II* are materially different, more than sufficiently different to preclude the application of issue preclusion under *Storm* and *Davis*. Proof of Tucker's fiduciary duty and breach thereof, which does not invoke a "transaction-oriented" test, was irrelevant to any issue actually decided in *ASCII I*, including the question presented by the motion to disqualify Tucker's firm in *ASCII I*, which necessarily invokes a "transaction-oriented" test. *Compare Tessier v. Plastic Surgery Specialists, Inc.*,

731 F.Supp. 724, 729 (E.D. Va. 1990) (holding that to disqualify a party's counsel, a party must prove the existence of a prior attorney-client relationship and "that the former representation and the current controversy are substantially related") *with Avianca, Inc. v. Harrison*, 1995 U.S. App. LEXIS 30863, *4 (D. C. Cir. 1995) (noting that "a lawyer's duty of loyalty toward his client applies whenever the client reasonably believes that the lawyer continues to act in a fiduciary capacity" and that the "lawyer's duty of loyalty is not 'a transaction oriented relationship' but 'an ongoing relationship giving rise to a continuing duty to the client unless and until the client understands, or reasonably should understand that the relationship is no longer to be depended on.'") (citations omitted); *Government of Rwanda v. Rwanda Working Group*, 227 F. Supp. 2d 45, 64 (D.D.C. 2002) (noting under D.C. law, that (a) the "fiduciary duties owed by an attorney to a client extend to all matters in which the attorney is involved, not simply the ones in which he is expressly retained as legal counsel and receives legal fees"; and (b) that "'[u]nless the clients consent after full disclosure, the duty of undivided loyalty is breached where a lawyer represents clients with conflicting interests'") (citations omitted) *appeal dismissed*, 2003 WL 1089896 (D.C. Cir. 2003). At trial, the Court in *ASCII I* determined that Tucker's conduct was irrelevant to the issues being tried. Appendix F at 28a-30a. By contrast, Tucker's conduct is at the core of the Complaint in *ASCII II*.

At a minimum, the Fourth Circuit's implied conclusion that Weinberger's separate allegations against Tucker for breach of fiduciary duty are precluded with his claims for malpractice, ignored the

breadth of D.C. law on the scope of an action for breach of fiduciary duty. As the Fourth Circuit recognized, and as Petitioner's Complaint alleges, Weinberger's reliance on Tucker continued well past January 2001. 510 F.3d at 490, Appendix A at 4a-5a. Those facts are material to Petitioners' claims for breach of fiduciary duty under D.C. law, an issue not addressed in *ASCII I*.

In sum, should the Fourth Circuit's decision be permitted to stand, there will be irreconcilable conflict on the application of the Virginia rules of issue preclusion between the Fourth Circuit and the Supreme Court of Virginia, a result anathema to *Semtek* and *Erie*.

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED DECEMBER 20, 2007

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-2302

ALAN D. WEINBERGER;
THE ASCII GROUP, INCORPORATED,

Plaintiffs-Appellants,

v.

STEFAN F. TUCKER,

Defendant-Appellee.

Argued: September 27, 2007

Decided: December 20, 2007

Before WILKINSON, MOTZ, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge Gregory wrote the opinion, in which Judge Wilkinson and Judge Motz joined.

Appendix A

OPINION

GREGORY, Circuit Judge:

This case addresses whether the Virginia doctrine of collateral estoppel applies to allegations of legal malpractice. Alan D. Weinberger ("Weinberger") and ASCII Group, Inc. ("ASCII") sued their former lawyer, Stefan F. Tucker ("Tucker"), for fraud, breach of fiduciary duty, and professional negligence. For the reasons outlined below, we affirm the district court's finding that collateral estoppel bars this lawsuit.

I.

Weinberger is the founder and CEO of ASCII. TechnologyNet, Inc. ("TechNet") is a separate corporation, incorporated by Weinberger and others. ASCII retained the Tucker, Flyer, & Lewis law firm in May 1998. At that firm, Tucker was primarily responsible for representing ASCII. When he moved to Venable, Baetjer & Howard, LLP ("Venable") in 2000, Weinberger and ASCII went with him as clients.

Concurrently, Tucker and Venable represented technology investor Lev Volftsun ("Volftsun"). In Fall 2000, at a party at his house, Tucker introduced Weinberger and Volftsun. At that time, TechNet was seeking investors. In January 2001, Tucker arranged a meeting between Weinberger and Volftsun at Venable's office, during which Volftsun agreed to loan TechNet $250,000 and to become a member of the Board. On

January 9, 2001, Tucker helped negotiate a bridge note and other terms of Volftsun's loan to TechNet. In conjunction with the January meeting, Tucker sent both parties a waiver letter, stating that with regard to the loan Tucker had only represented Voftsun's interests.[1]

1. The letter, addressed to "Alan and Lev" stated:

> As we discussed—during separate telephone conversations that I have had with Alan (and in some of those, Robert Freer) and with Lev, and in the conference which we all had at the Venable Tyson's [sic] office on January 9, 2001—Venable and in most circumstances I personally have represented (i) Lev and Margo Volftsun in connection with a number of personal matters, including estate planning; (ii) Alan and Lauren Weinberger in connection with a number of personal matters, including estate planning and Alan's contract with TechnologyNet, Inc.; (iii) The ASCII Group, Inc. in connection with the negotiation of its relationship with TechnologyNet, Inc., and the agreements resulting therefrom; and (iv) TechnologyNet, Inc. in connection with some of the issues related to its disassociation with i2. In other words, at one point or another, Venable has represented all of you in connection with one or more matters.
>
> Notwithstanding the foregoing, it is recognized by Lev, Alan, TechnologyNet, Inc. and The ASCII Group, Inc. that, with regard to Lev's $250,000 loan to TechnologyNet, Inc., as evidenced by Bridge Note No. 7, and Lev's acquisition of 175,000 options to acquire TechnologyNet, Inc. stock, Venable, and I personally, have represented only Lev. My role, in

(Cont'd)

The letter, dated January 17, 2001, was intended to apply retroactively to the January 9 meeting.

In Spring 2001, TechNet began to decline and Weinberger sought to protect his estate, as well as ASCII, from TechNet creditors. Weinberger claims he met with Tucker at Venable, seeking his advice, and that Tucker advised him to create a separate holding company.[2] In the process of creating the holding company, ASCII Technology Holdings, Inc. ("ATH"), Weinberger and ASCII sought the assistance of another attorney, Paul Rogers ("Rogers") of Covington & Burling. Rogers presented the proposal to the TechNet Board on July 13, 2001. In Summer 2001, Weinberger

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(Cont'd)

> large measure, was to review the documentation, obtain the appropriate back-up documents and agreements, and advise Lev of the risks inherent in such a loan. I performed that role prior to and during our meeting on January 9, 2001.
>
> As a condition precedent to my undertaking the foregoing on behalf of Lev, Lev, [sic] Alan, TechnologyNet, Inc. and The ASCII Group, Inc. agreed to waive any actual or potential conflicts of interest. I am sending this letter to you to reflect the same, and I am requesting that you sign a copy of the letter and return it to me.

(J.A. 96-97.)

2. However, at a deposition in *Volftsun v. The ASCII Group*, Tucker maintained he recalled no such meeting. (J.A. 969-71.)

held discussions with board members, including Volftsun, concerning loans to TechNet. Volftsun agreed to loan TechNet an additional $150,000. ASCII was to guarantee both Volftsun's January 2001 and July 2001 loans. Weinberger alleges that he sent Tucker a letter that stated:

> as I have told you and Lev many times, that any language of any possible guarantee of ASCII lasts only until, the holding company is agreed to by vote of stockholders. I would never risk 17 years of my life's work and the livelihood of long term employees and put in jeopardy ASCII, but I am enabling 150 investors of TechnologyNet, Inc., many who I know personally, to obtain some return. As my lawyer, this is very important to me for you to understand.

(J.A. 148.)[3] In September 2001, a memo from ATH was sent to all the TechNet and ASCII shareholders offering to exchange their shares for shares in ATH. According to Weinberger, all the shareholders but Volftsun complied. Weinberger attempted to convince Volftsun to convert his debt into equity, but ultimately failed.

---

3. Tucker testified that he never received the letter. (J.A. 376.)

Appendix A

A. *Volftsun v. ASCII Group (ASCII I)*

Volftsun, represented by Venable, sued ASCII, ATH, and TechNet (collectively "ASCII") in the Eastern District of Virginia to enforce the guarantee ("the underlying case"). ASCII filed a motion to disqualify counsel, alleging a conflict of interest. Volftsun filed a brief in opposition to the motion to disqualify. The court held a hearing on the motion and denied the motion to disqualify, based on the January 2001 waiver letter. Ultimately, the court found the guarantee binding on ASCII and entered a final judgment in favor of Volftsun.

B. *Weinberger v. Tucker (ASCII II)*

On July 1, 2004, Weinberger and ASCII (collectively "Weinberger" with respect to this action) filed a suit against Tucker for fraud, breach of fiduciary duty, and professional negligence. Tucker moved to dismiss, based on collateral estoppel. On September 29, 2005, the United States District Court for the District of Columbia transferred the case to the Eastern District of Virginia ("district court") and denied Tucker's motion without prejudice for mootness. Following the transfer, Tucker filed a renewed motion to dismiss, also based on collateral estoppel. Weinberger filed a response to the renewed motion to dismiss. The district court held a hearing on Tucker's motion, dismissed Weinberger's claim based on collateral estoppel, and entered a judgment for Tucker on November 9, 2006. Weinberger appeals to this Court.

II.

As all parties are in agreement as to the proper standard, we review the district court's decision de novo.

Collateral estoppel, or issue preclusion, provides that once a court of competent jurisdiction actually and necessarily determines an issue, that determination remains conclusive in subsequent suits, based on a different cause of action but involving the same parties, or privies, to the previous litigation. *See Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) (quoting *S. Pac. R. Co. v. United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 42 L.Ed. 355 (1897)) ("[A] 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies....' ") (omissions in original); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). Thus, "[t]he doctrine of collateral estoppel precludes relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate." *Virginia Hosp. Ass'n. v. Baliles*, 830 F.2d 1308, 1311 (4th Cir.1987).

Both parties agree that, as this is a diversity jurisdiction case in a Virginia federal district court, Virginia collateral estoppel law applies. In Virginia, collateral estoppel requires: (1) the parties to the two

proceedings, or their privies, be the same; (2) the factual issue sought to be litigated must have been actually litigated in the prior action and must have been essential to the prior judgment; and (3) the prior action must have resulted in a valid, final judgment against the party sought to be precluded in the present action. *In re Ansari*, 113 F.3d 17, 19 (4th Cir.1997) (quoting *TransDulles Ctr., Inc. v. Sharma*, 252 Va. 20, 472 S.E.2d 274, 275 (1996)). Additionally, in Virginia, collateral estoppel requires a fourth element, mutuality. *Id.*

Weinberger maintains that he is not estopped from bringing his professional negligence, fraud, and breach of fiduciary duty claims, as Volftsun's failure to convert his debt into equity and the validity of the guarantee were the central issues in *ASCII I*. Tucker counters that the denial of the motion to disqualify and the upholding of the guarantee fundamentally resolve the disputes at issue in the case. We agree.

A.

The first element of collateral estoppel requires that the parties, or their privies, be parties to the underlying case. Weinberger argues that the parties are not the same: in the first action Volftsun sued ASCII, TechNet, and ATH, and in this action, Weinberger and ASCII sued Tucker. Tucker responds that even though Tucker and Weinberger were not parties to the original proceedings, privity exists between Weinberger, as the founder and CEO of ASCII, and the company itself, as well as between Volftsun and Tucker, as his lawyer.

"Under both Fourth Circuit and Virginia decisions, the test for privity is [ ] the same: whether the interests of one party are so identified with the interests of another that representation by one party is representation of the other's legal right." *Londono-Rivera v. Virginia*, 155 F.Supp.2d 551, 565 (E.D.Va.2001) (citing *State Water Control Bd. v. Smithfield Foods, Inc.*, 261 Va. 209, 542 S.E.2d 766, 769 n. 4 (2001)). According to the Virginia Supreme Court in *State Water Control Board v. Smithfield Foods, Inc.*, 542 S.E.2d at 769 (citing *Nero v. Ferris*, 222 Va. 807, 284 S.E.2d 828, 831 (1981); *Storm v. Nationwide Mut. Ins. Co.*, 199 Va. 130, 97 S.E.2d 759, 762 (1957)),

> There is no single fixed definition of privity for purposes of res judicata. Whether privity exists is determined on a case by case examination of the relationship and interests of the parties. The touchstone of privity for purposes of res judicata is that a party's interest is so identical with another that representation by one party is representation of the other's legal right.

We now conduct an individualized examination of whether collateral estoppel properly applies to each of the parties in the present action: ASCII, Weinberger, and Tucker.

Appendix A

1.

As ASCII was a party in the underlying case and is also a party here, collateral estoppel clearly can apply.

2.

Weinberger argues that his interests are distinct from ASCII's in the underlying action. He maintains that he was personally represented by Tucker and is bringing the action not only on behalf of ASCII but on behalf of himself in his individual capacity. Tucker responds that the damages Weinberger alleges stem from his shared economic identity with ASCII. He is correct.

As the chairman of both ASCII and the holding company and as the owner of a majority of ASCII's stock, Weinberger is the real party of interest when ASCII incurs damages. Weinberger's interests are so in line with those of ASCII that representation by ASCII in the underlying action effectively represented Weinberger's legal rights in the present case.[4] We, therefore, hold that there is privity between Weinberger and ASCII.

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4. Had Weinberger brought a legal malpractice action against Tucker based on issues stemming from Tucker's conduct in handling Weinberger's estate or tax planning, ASCII would not have adequately represented Weinberger's interests in the previous action. At oral argument, however, Weinberger conceded that all the claims in the present action flow from Tucker's actions surrounding the guarantee.

3.

According to Weinberger, Tucker is not in privity with Volftsun. Weinberger argues that the attorney-client relationship is not sufficient to establish privity. Furthermore, Weinberger points out that Tucker did not represent Volftsun in *ASCII I* and that Tucker never testified or presented any evidence that he had a personal stake in the *ASCII I* litigation. Tucker responds that he and Volftsun shared identical interests with respect to the motion to disqualify Venable and the validity of the guarantee. Tucker argues that he had a particularly strong interest, as the enforcement of the guarantee rested on his conduct and he faced the possibility of a legal malpractice suit by Volftsun had the defendants in *ASCII I* succeeded in their defenses that the guarantee had expired or that the guarantee was fraudulently induced. We again agree with Tucker.

The concept of privity requires an alignment of interests and not an exact identity of parties. In *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484, 494 (4th Cir.1981), this Court applied the definition of privity employed by Judge Goodrich in his concurrence in *Bruszewski v. United States*, 181 F.2d 419, 423 (3d Cir.1950):

> "Privity states no reason for including or excluding one from the estoppel of a judgment. It is merely a word used to say that the relationship between the one who is a party on the record and another is close

> enough to include that other within the res judicata."

Thus, privity centers on the closeness of the relationship in question. Courts have held that the attorney-client relationship itself establishes privity. *See, e.g., Plotner v. AT & T Corp.*, 224 F.3d 1161, 1169 (10th Cir.2000) (citing *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1235 n. 6 (7th Cir.1986)) ("The law firm defendants appear by virtue of their activities as representatives of Green and AT & T, also creating privity."); *Henry*, 808 F.2d at 1235 n. 6 ("Even though the Bank was the only actual party to the state court mortgage foreclosure proceedings, the other defendants, as directors, officers, employees, and attorneys of the Bank, are in privity with the Bank for purposes of res judicata."); *Verhagen v. Arroyo*, 552 So.2d 1162 (Fla. 3d DCA 1989) (holding that under Florida law for the purposes of collateral estoppel, an attorney is in privity with his or her client in a previous suit when the opposing party in that action brings a subsequent suit against the attorney based in the same facts); *see also* 47 Am.Jur.2d, Judgments § 617. *But see Cont'l Sav. Ass'n v. Collins*, 814 S.W.2d 829 (Tex.App. Houston [14th Dist.] 1991) (holding that under Texas law the mere representation of a party in a lawsuit does not establish privity between an attorney and his or her client). We do not hold, however, that privity exists with respect to every attorney-client interaction. Rather, we conclude here that because Tucker's interests were so identified with Volftsun's, Volftsun effectively

represented Tucker's legal rights in *ASCII I*.[5] Tucker, as Volftsun's attorney during the loan negotiation, had an undeniable interest in the motion to disqualify, as well as in the enforcement of the guarantee. Tucker's professional conduct, in fact, was validated by the court's honoring the waiver and enforcing the guarantee. Accordingly, we hold that Volftsun and Tucker were privies.

B.

For collateral estoppel to apply, the factual issues in the subsequent case must have been essential to and actually litigated in the underlying case.

1.

In this case, Weinberger sued Tucker for professional negligence, breach of fiduciary duty, and fraud. Weinberger explains that while the enforcement of the guarantee was at issue in the first litigation, this action deals specifically with Tucker's misconduct. Tucker argues that the judge's findings in *ASCII I* negate the elements of Weinberger's claims against Tucker.

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5. Again, had Weinberger alleged claims not flowing from the guarantee, Tucker and Volftsun would not have been privies with respect to those claims, as Volftsun could not have represented Tucker's interest.

Appendix A

The district court in *ASCII I* resolved issues essential to the present case. For example, in honoring the waiver letter and denying the motion to disqualify Venable, the court rejected ASCII's, and therefore Weinberger's, argument that Venable was simultaneously representing ASCII, Weinberger, and Volftsun. In so doing, the district court found that, as of the waiver letter, ASCII, and thus ASCII's privy Weinberger, enjoyed no attorney-client relationship with Tucker or other Venable lawyers with respect to the guarantee. If Tucker was not Weinberger's lawyer, Weinberger could not sue Tucker for legal malpractice or breach of fiduciary duty, as Tucker's only professional obligations laid with Volftsun. Similarly, the district court's rejection of ASCII's fraudulent inducement argument and upholding of the guarantee's validity undermine Weinberger's fraud claim. Because the central disputes of this case flow from the waiver agreement and Tucker's conduct with regard to the validity of the guarantee, we hold that the issues resolved in *ASCII I* are essential to Weinberger's current claims.

2.

Weinberger asserts that the denial of the motion to disqualify did not constitute a full and fair review. Tucker, however, contends that the issue is not precluded merely based on the motion to disqualify, but also on the finding on the merits that the guarantee was enforceable and was not fraudulently induced, the finding that the parties were separately represented with respect to the

guarantee, and the finding that the guarantee was negotiated at arm's length.

In *TransDulles*, 472 S.E.2d at 276, the Virginia Supreme Court rejected the proposition that for an issue to be "actually litigated" the opposing party must personally appear at a hearing and contest the matter. Thus, Virginia law does not require a hearing for an issue to be considered actually litigated. In the first action, ASCII raised the possible conflict of interest issue in its motion to disqualify. Thus, through ASCII, Weinberger had the opportunity to present evidence in accordance with that motion. The court in *ASCII I* assessed the information presented and made the determination that Weinberger had waived Tucker's and Venable's representation of ASCII with respect to the guarantee. Furthermore, in the underlying action, ASCII raised the affirmative defense of fraudulent inducement. Consequently, in deciding to uphold the guarantee, the district court considered whether it had been fraudulently induced. We, therefore, hold that the issues in this action were actually litigated in *ASCII I*.

C.

Additionally, the prior judgment must have been final and valid. Weinberger maintains that the ruling on the motion to disqualify is not a final judgment subject to appeal because ASCII appealed in July 2003 and, due to a lack of funds, entered settlement negotiations with Volftsun in August 2003. This argument is not compelling. According to the Virginia Supreme Court,

"a judgment is not final for the purposes of *res judicata* or collateral estoppel when it is being appealed or when the time limits fixed for perfecting the appeal have not expired." *Faison v. Hudson*, 243 Va. 413, 417 S.E.2d 302, 305 (1992). Although Weinberger executed a settlement agreement while the appeal was pending, the appeal was no longer pending after a settlement agreement was reached and the time for appealing has long since expired. *ASCII I* is a final, valid judgment.

D.

Under the principle of mutuality, a litigant may not invoke a preclusive judgment if he would not have been bound by the opposite result. *Rawlings v. Lopez*, 267 Va. 4, 591 S.E.2d 691, 692 (2004) (citing *Norfolk & Western Ry. v. Bailey Lumber Co.*, 221 Va. 638, 272 S.E.2d 217, 218 (1980)). Weinberger argues that Tucker would not have been bound by the decision on the motion for disqualification. Tucker argues that mutuality exists because the granting of the motion to disqualify or a finding that the guarantee was not enforceable would have bound Tucker.

In *Angstadt v. Atlantic Mutual Insurance Co.*, 249 Va. 444, 457 S.E.2d 86 (1995), an injured party sued, claiming that the insured's negligence caused his injury, and a default judgment was entered. When the insurer learned of the default judgment, it disclaimed coverage and sued for a declaratory judgment to be relieved from any obligation to pay in the underlying tort case. The Virginia Supreme Court reversed and remanded the

grant of summary judgment in favor of the insured. Among the reasons the court held that collateral estoppel did not apply was a lack of mutuality, as the insurer was not a party to the original action. *Angstadt*, 457 S.E.2d at 88 (citing *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 355 S.E.2d 579 (1987); *Bailey*, 272 S.E.2d at 217). However, mutuality does not require the same parties but rather "that to be effective the estoppel of the judgment must be mutual." *Bailey*, 272 S.E.2d at 218. The insurer was not bound by a judgment against the insured and, therefore, could not prevail on its claim of collateral estoppel. Yet unlike in the insurer-insured relationship, the Virginia Supreme Court has held that mutuality can exist between attorneys and their clients, when the attorney was not a party to the previous action. In *Hozie v. Preston*, 493 F.Supp. 42 (W.D.Va.1980), the Hozies sued their lawyer, Preston, after he had entered into a settlement agreement with Hart on their behalf. When the Hozies refused to honor the agreement, Hart sued in a Virginia court, asking that the court enforce the settlement. The singular issue in that lawsuit was whether Preston had the authority to enter into the agreement on the Hozie[illegible] behalf. The jury found that he did. Subsequently, the Hozies sued Preston, alleging that he failed to adequately represent them. The district court granted summary judgment, finding that the mutuality requirement did not prevent collateral estoppel from barring the Hozies' second lawsuit. Similarly, we hold that mutuality does not bar Tucker from estopping Weinberger's lawsuit, because if ASCII had prevailed on the motion to disqualify Venable or in its fraudulent inducement affirmative defense, Tucker would have been bound by the ruling with respect to liability in a subsequent legal malpractice action.

III.

Weinberger cannot prevail on his claims without directly contradicting the court's findings in *ASCII I*. We hold that Virginia's doctrine of collateral estoppel bars any attempt by Weinberger to repackage the claims rejected in the underlying case as claims against Tucker. Accordingly, we affirm the district court's dismissal.[6]

AFFIRMED

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6. On May 21, 2007, Tucker filed a motion for leave to file a surreply with a proposed surreply. Weinberger opposed. We deferred consideration until oral argument. We now grant Tucker's motion and accept his surreply.

APPENDIX B — EXCERPTS OF TRANSCRIPT OF MOTION HEARING OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED NOVEMBER 9, 2006

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 1:06cv1070

Alexandria, Virginia
November 9, 2006
10:00 a.m.

ALAN D. WEINBERGER, et al.,

Plaintiffs,

vs.

STEFAN F. TUCKER,

Defendant.

TRANSCRIPT OF MOTION HEARING BEFORE THE HONORABLE LEONIE M. BRINKEMA UNITED STATES DISTRICT JUDGE

Appendix B

[commencing at page 17]

* * *

THE COURT: All right. Well, again, we went through this record very carefully, and I have not heard anything today in the oral argument — and I certainly have invited it — that dissuades me from my original conclusion based upon the papers that this is definitely a case where collateral estoppel would bar this litigation.

Again, I am satisfied that the parties in the two proceedings or their privies are the same, that the factual issue that's sought to be litigated in this case actually must have been litigated in the prior action and essentially — and it was essential to the prior judgment, and it was.

I mean, again, the prior action did involve whether or not the two loans that were at issue were bona fide loans upon which the plaintiffs in this case would be liable, and the judge found that they were and imposed a judgment of about six-hundred-and-something thousand of principal and interest, because the monies were never paid apparently.

[18] And so the whole argument and a significant part of the defense in that ASCII first litigation did involve the nature of how these agreements were developed and the relationship of Mr. Tucker to all that. It permeated that proceeding, regardless of how, Mr. Hoge, you're trying to describe it in this case.

And as I said, there was a valid final judgment that was entered against the parties who are now trying to bring this action, and I'm satisfied on this record and the very specific facts of this case and of ASCII I that the motion to dismiss is properly made, and so I'm granting the motion to dismiss, and judgment will be entered today, and that's that.

That concludes the civil docket, I believe.

Mr. DiMuro, yes?

MR. DiMURO: Yes.

THE COURT: All right, we'll recess court for the day.

(Which were all the proceedings had at this time.)

* * * *

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION FILED NOVEMBER 9, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

1:06cv1070

ALAN D. WEINBERGER, *et al.*,

Plaintiffs,

v.

STEFAN F. TUCKER,

Defendant.

ORDER

For the reasons stated in open court, Defendant's Renewed Motion to Dismiss is GRANTED. Accordingly, it is hereby

ORDERED that the Clerk enter judgment in favor of the defendant pursuant to Fed. R. Civ. P. 58.

The Clerk is directed to forward copies of this Order to counsel of record.

Appendix C

Entered this 9th day of November, 2006.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED MARCH 14, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action 02-1717-A

LEV VOLFTSUN,

Plaintiff,

v.

THE ASCII GROUP, INC., et al.,

Defendants.

ORDER

This matter comes before the Court on Defendants' Motion to Disqualify. For reasons stated from the bench, it is hereby,

ORDERED that Defendants' Motion to Disqualify is DENIED.

s/ Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
March 14, 2003

APPENDIX E — EXCERPTS OF HEARING ON MOTIONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED MARCH 14, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. No. 02-1717-A

LEV VOLFTSUN,

Plaintiff,

-vs-

THE ASCII GROUP, INC., et al.,

Defendants.

HEARING ON MOTIONS

March 14, 2003

Before: Claude M. Hilton, Judge

Appendix E

[commencing at page 15]

* * *

THE COURT: All right. Well, I believe that to be the case.

What has been presented to me, I believe that there was a waiver made in this situation that covers it. That the defendants were on notice that the plaintiff was being represented by Venable during the essence of these discussions. And that the motion to disqualify counsel should be denied.

MR. DOUMAR: Thank you, Your Honor.

MR. HARVEY: Thank you, Your Honor.

THE COURT: All right. Thank you-all.

HEARING CONCLUDED

* * * *

APPENDIX F — EXCERPTS OF TRIAL TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED JUNE 11 AND 12, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. No. 02-1717-A

LEV VOLFTSUN,

Plaintiff,

-vs-

THE ASCII Group, INC., et al.,

Defendants.

TRIAL TRANSCRIPT

June 11 & 12, 2003

Before: Claude M. Hilton, Judge

Appendix F

[Commencing at page 129]

* * *

[S.F. Tucker - Cross]

THE COURT: The only question is did he enter into this merger agreement, was he a part of it. Did he sit there on the Board and agree to have all this merged. It doesn't matter whether it is a good deal or a bad deal or whether they had enough money or whether they didn't.

MR. ARONICA: Well, we are talking about the guarantee. So, you know, the merger I think is clear —

THE COURT: The guarantee is either in effect or it is not. That is going to be a legal question.

MR. ARONICA: That's correct.

THE COURT: And nobody's opinion is going to affect that one way or another.

MR. ARONICA: But I want to ask a question that there was testimony about and he can answer that.

THE COURT: All right.

BY MR. ARONICA: (Continuing)

Q. And that is, you understood or believed that the merger would occur on the vote of the shareholders, did you [130] not?

MR. HARVEY: Objection, Your Honor, relevance as to his understanding of what the merger is.

MR. ARONICA: Well, he is advising his client on the terms of this agreement.

THE COURT: But that doesn't make any difference. It is a legal question of when that closed. All I want is the facts. I don't want anybody's opinion about when it closed.

MR. ARONICA: If I may —

THE COURT: It doesn't make any difference.

Objection sustained. It makes no difference what he thinks, or you think, or your opponent thinks.

MR. ARONICA: I know that, Judge. But we are talking about this letter that he said he didn't receive.

THE COURT: These opinions won't help you.

Objection sustained.

You are just prolonging my decision, you see.

That's all that does by getting opinions in.

MR. ARONICA: Judge, I am just going through my stuff.

Appendix F

THE COURT: Well, I am just trying to help you along.

MR. ARONICA: I know you were.

Nothing further, Judge

* * * *

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC FILED JANUARY 15, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-2302
(1:06-cv-01070)

ALAN D. WEINBERGER;
THE ASCII GROUP, INCORPORATED,

Plaintiffs - Appellants

v.

STEFAN F. TUCKER,

Defendant - Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Motz, and Judge Gregory.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX H — RELEVANT STATUTE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V. PROCEDURE
CHAPTER 111. GENERAL PROVISIONS

28 USCS § 1652

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.